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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 80

JOHN E. RING,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY

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IN THE

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OCTOBER TERM, 1964

No.

JOHN E. RING,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY

Petitioner, John E. Ring, prays that a writ of certiorari issue to review that part of a judgment of the Appellate Division of the Superior Court of November 10, 1964, which remanded the case for a new trial on the ground of double jeopardy.

Opinions Below

The opinion of the Appellate Division of the Superior Court, dated November 10, 1964, is reported in 85 N.J. Super 341 and is printed in the appendix at pages 1a to 4a.

The pertinent parts of a petition for certification to the Supreme Court of New Jersey claiming that remand for a new trial violated the New Jersey and

United States Constitutions, and an order denying the petition without opinion, February 4, 1965, are printed in the appendix at pages 7a to 15a.

Jurisdiction of This Court

The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1257 (c) to review a final judgment of the highest Court in New Jersey on which a decision can be had on the ground that remand for a new trial after reversal of a conviction for insufficiency of evidence, where there was no motion for a new trial, is a violation of the Fifth and Fourteenth Amendments of the United States Constitution.

Remand for new trial is a final judgment on the question of double jeopardy within the meaning of Title 28 U.S.C. Section 1257, *Sapir* vs. *United States*, 348 U.S. 373 (1955).

Questions Presented for Review

1. Should the decision of this Court in *Palko* vs. *Connecticut*, 302 U.S. 319 be reviewed and overruled?

2. Is the remand for a new trial in this case double jeopardy, in view of the Fifth and Fourteenth Amendments of the United States Constitution?

Constitutional Provisions Involved

This case involves the double jeopardy provision of the Fifth Amendment and Section One of the Fourteenth Amendment of the United States Constitution.

Statement of the Case

This case began in the Municipal Court of Lyndhurst, New Jersey in July, 1963 on the complaint of a police officer untrained in the law. The magistrate acted as prosecutor and judge.

The policeman testified that he trailed and clocked the defendant for a distance of two-and-a-half blocks at 49 miles an hour, and that both he and the defendant started from a standstill and came to a stop when he gave the ticket. The entire distance traveled from a standing start to giving the ticket was only three blocks. The feat claimed by the policeman was impossible, even with a jet engine, and there was no evidence submitted as to speed limit.

The petitioner was convicted, fined $100.00 and $5.00 costs, and his license revoked for one year. The penalty is severe because, though petitioner caused no personal or property damage, upon reissuance of his license, insurance premiums are greatly increased for three years and his license will be automatically revoked for six months on any subsequent motor vehicle violation.

The petitioner appealed to the County Court, Rule 3:10, Rules of Criminal Practice of New Jersey.

Though called an appeal, it is a trial de novo in the County Court and is prosecuted by the county prosecutor. The County Court does not review the Municipal Court, but sits as a Court of original criminal jurisdiction and the Municipal Court proceedings are annuled.

State vs. *Joas,* 34 N.J. 179 (1961 — P. 189)
State vs. *Fiore,* 69 N.J. Super. 122 App. Div. (1961 — P. 126)

The trial de novo shall be on the transcript of the testimony from the Municipal Court, if there is one, unless either side claims prejudice, in which case there will be a plenary trial and the witnesses called, Rule 3:10-10.

Before the hearing in the County Court, pursuant to Rule 3:10-10(A), the petitioner served and filed a brief and a motion for acquittal on the ground that there was no evidence to prove speed limit. The petitioner's brief cited and relied on *State* vs. *Miller,* 58 N.J. Super. 538 (Cty. Ct. 1959) making acquittal mandatory.

The prosecutor thus had notice, opportunity and duty to correct any deficiency in proof, but stood on the record. He made no claim of prejudice or demand for a plenary trial to call witnesses under Rule 3:10-10 nor under *State* vs. *Menke,* 25 N.J. 66 (1957) which gives the trial court some jurisdiction to reopen for additional testimony on proper showing.

An acquittal was mandatory under Rule 3:7-6 (appendix P. 18a) but the petitioner was convicted in the County Court and fined $100.00 and $5.00 costs and the revocation of his license was left to the discretion of the Motor Vehicle Bureau.

The Appellate Division reversed the conviction for insufficiency of proof and remanded for a new trial if the State "desires one" (appendix P. 2a, 4a).

How the Federal Question Was Raised and Decided Below

The Appellate Division asked each side to argue the right of the Court to remand if the conviction should be reversed for insufficiency of evidence. The petitioner claimed a right to mandatory acquittal for insufficiency of evidence, because there was no demand for new trial, but had to admit that the cases in New Jersey made remand for a new trial under such circumstances discretionary.

The Appellate Division remanded for a new trial citing among other cases, *State* vs. *Lamoreaux,* 20 N.J. Super. 65 (1952) for its discretionary authority to remand.

A petition for a writ of certification to the Supreme Court of New Jersey was timely made to review the remand for a new trial on the ground of double jeopardy under State and Federal Constitutions. Whether the application to review should have been by petition for certification or by direct appeal is immaterial, because Rule 1:10-4(E) provides:

> "Where certification is sought to review a judgment or order of the Appellate Division and it appears that the petitioner was entitled to an appeal as of right, certification shall be granted."

The pertinent parts of the petition for certification are printed in the appendix Pages 7a to 14a.

The petition for certification was denied February 4, 1965 by the Supreme Court of New Jersey (appendix p. 15a).

The judgment of the Appellate Division of the Superior Court became the final judgment of the highest Court of this State on the question of double jeopardy herein involved.

Reasons for Granting the Writ

1. The decision of *Palko* vs. *Connecticut*, 302 U.S. 319 should be reconsidered and reversed.

Mr. Justice Cardozo, in the *Palko* decision, said that privileges and immunities which (P. 326):

> "in their origin were effective against the Federal Government alone, had by prior cases been taken over from the earlier articles of the Federal Bill of Rights and brought within the Fourteenth Amendment by process of absorption."

At that time, they included freedom of speech and other parts of the First Amendment, that part of the Fifth Amendment which provides that private property shall not be taken for public use without just compensation and, to some extent, the right to counsel in criminal cases.

Mr. Justice Cardozo said that the exclusion of the double jeopardy provision from the States (P. 324):

> "had been dictated by a study and appreciation of the meaning of essential implications of liberty itself."

He relied heavily on *Twining* vs. *New Jersey*, 211 U.S. 78, which has been overruled, holding that several of the Bill of Rights have been held not binding

on the States, particularly the right against self-incrimination. He gave great weight to the fact that students of our penal system regard the right against self-incrimination as a mischief rather than a benefit.

The very recent case of *Murphy* vs. *Waterfront Commission,* 378 U.S. 52 finds Mr. Justice Goldberg saying just the opposite:

> "The privilege against self-incrimination registers an important advance in the development of our liberty, one of the landmarks in man's struggle to make himself civilized."

Since the *Palko* decision, the Fourth, the Eighth, part of the Sixth and the privilege against self-incrimination of the Fifth, have all been absorbed by the Fourteenth Amendment, *Mapp* vs. *Ohio,* 367 U.S. 643; *Robinson* vs. *California,* 370 U.S. 660; *Gideon* vs. *Wainwright,* 372 U.S. 335 and *Malloy* vs. *Hogan,* 378 U.S. 1, and other cases.

All this advance is consistent with Mr. Justice Cardozo's statement in *Palko* (P. 326):

> "If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice could exist if they were sacrificed."

That time and experience have changed our:

> "appreciation of the meaning of essential implications of liberty itself,"

is clearly expressed in the dissenting opinion of Mr. Justice Black in *Bartkus* vs. *Illinois,* 359 U.S. 121

twenty years after the *Palko* decision. He said, P. 150:

> "For I think double prosecutions for the same offense are so contrary to the spirit of our free country that they violate even the prevailing views of the 14th amendment, expressed in Palko vs. Connecticut, 302 U.S. 319,"

and P. 151:

> "Fear and abhorrence of Government power to try people twice for the same conduct is one of the oldest ideas found in western civilization. Its roots run deep into Greek and Roman times * * * By the Thirteenth Century it seems to have been firmly established in England."

In a footnote in the opinion (P. 163) he referred to a case in Moscow where a man was convicted and sentenced to imprisonment, and then, because the people were not satisfied with the punishment, he was tried and convicted again and sentenced to death—a thing that can happen only in dictatorships.

He said P. 164:

> "I had thought that our constitutional protections embodied in the Double Jeopardy and Due Process clauses would have barred any such things happening here. Unfortunately, last years holdings by this court in * * * cause me to fear that in an important number of cases it can happen here."

The same thing happened to Mr. Palko. Not being satisfied with the sentence, the State of Connecticut,

on its own appeal, vacated the conviction for second degree murder and life imprisonment and tried and convicted him again and sentenced him to death.

The highest Court of this country refused to apply the Double Jeopardy Provision of the Fifth Amendment and affirmed the death sentence. But the opinion pointed out that his right of free speech could not be taken away, because without that:

"neither liberty nor justice would exist."

This could not happen again if the Fifth Amendment Double Jeopardy Provision is absorbed into the Fourteenth Amendment, in view of the principle of *Green* vs. *United States,* 355 U.S. 184.

2. The remand for a new trial should be vacated and a final acquittal ordered under the double jeopardy provisions of the Fifth and Fourteenth Amendments.

In *Malloy* vs. *Hogan,* 371 U.S. 1, the court said that the provisions of the Bill of Rights that have been absorbed by the Fourteenth Amendment are to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against Federal encroachment; and the Court has rejected the notion that the Fourteenth Amendment applies to the States only a watered-down subjected version of the Bill of Rights.

The New Jersey Constitution provides, Article One Section 11:

"No person shall, after acquittal, be tried for the same offense."

This is narrower than the Fifth Amendment, which provides:

> "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

In *State* vs. *Curry,* 41 N.J. 531 (1964) the Court said (P. 535) the Fifth Amendment embraces (double jeopardy) and some day it may be viewed as constitutionally binding on the States, in view of the Fourteenth Amendment; and explained (P. 536) that the use of the more limited phraseology in the New Jersey constitution was intended to secure that the defendant is not entitled to immunity from a second trial when the first terminated not in an "acquittal" but—other indecisive disposition.

The Court claimed that, nevertheless, its double jeopardy provision: (P. 536)

> "Justly assures that the State with its great resources will not be permitted to harass and oppress the individual by multiple prosecutions or punishment of the same offense."

Yet, the leading case of *State* vs. *Lamoreaux,* supra, which refused to apply the defense of double jeopardy after a reversal for insufficiency of evidence, because there must be an acquittal in law and in fact, and because the defendant was held to have waived the defense of double jeopardy by appealing was followed by two more trials and convictions, both of which were eventually reversed on appeal for insufficiency of evidence, 26 N.J. Super. 41 and 29 N.J. Super. 204, four years of harassment, insecurity and expense. The

waiver theory was completely overruled by Mr. Justice Black in *Green* vs. *United States,* 355 U.S. 184 (appendix p. 8a).

In the dissenting opinion of *Gori* vs. *United States,* 367 U.S. 364, Mr. Justice Douglas said (P. 370):

> "The question is not, as the Court of Appeals thought, whether the defendant is 'to receive absolution for his crime'."
>
> "The policy of the Bill of Rights is to make rare indeed the occasions where the citizen can for the same offense be made to run the gantlet twice."

This petitioner has run the gantlet twice. His conviction was reversed and he is now on his third attempted review to prevent another trial because he was entitled to a mandatory acquittal in the County Court. He will continue to be oppressed and harassed because of the discretionary rules in favor of the prosecutor, unless the Fifth Amendment standards of double jeopardy are applied to the States.

In *Downum* vs. *United States,* 372 U.S. 734, a conviction on a new trial two days after a mistrial had been granted over the defendant's objection, because the prosecutor did not have his witnesses ready, was reversed as double jeopardy. The opinion said (P. 737):

> "The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy."

and (P. 736):

> "Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favovrable opportunity to convict are examples when jeopardy attaches."

The situation is similar in this case. The prosecutor started a trial with insufficient evidence, but waived notice, opportunity and duty to correct the defect of proof in the County Court.

The County judge found a way to help the prosecutor, equally as offensive, as declaring a mistrial solely for that purpose.

He acknowledged there was no proof of speed limit, but denied a motion for mandatory acquittal, and convicted the defendant because the motion for the acquittal had not been made in the Municipal Court (appendix p. 2a). The judge knew that the proceedings in the Municipal Court were nullified, and were not to be reviewed by him and that he was sitting as a judge of original criminal jurisdiction.

> "The difference between a trial de novo on the lower court's transcript and a trial by plenary testimony in the County Court is merely procedural. In both cases, the County Court is acting as a trial court de novo, not as an appellate tribunal."

State vs. *Fiore, supra,* P. 126.

The Appellate Division reversed the conviction for insufficiency of evidence holding it was not necessary to have raised the point of insufficiency of evidence in the Municipal Court (appendix p. 2a). It denied the

final acquittal that was logically dictated by the reversal.

The Court found a way to help the prosecutor and give him another chance to convict by claiming discretion to remand for new trial.

It contradicted itself in holding that since the petitioner did not raise the point of insufficiency of evidence in the Municipal Court but reserved it for "appeal", (a point which it found prejudicial error and grounds for reversal when relied on by the County Court), the interests of the state outweigh the inconvenience of the defendant, and the state shall have a new trial "if it desires one." (appendix p. 4a).

By "appeal" the Appellate Division meant trial "de novo" in the County Court. It likewise knew that the Municipal proceedings were nullified, that the County Court sat as a court of original jurisdiction and the "trial de novo" was not in any sense an "appeal." *State* vs. *Fiore, supra,* P. 126.

The letters next referred to show that the harassment is to be continued by passing the discretionary privilege down the line until someone wants a new trial.

On February 15, 1965 the County prosecutor's office wrote to the Lyndhurst Magistrate that the Supreme Court had denied a petition for certification and:

> "You may now proceed to retry the defendant if you so desire,"

(letter appendix p. 16a).

The Magistrate set the case for trial, but wrote on March 15, 1965 that the new trial would be adjourned

pending the outcome of this petition for writ of certiorari to the United States Supreme Court (letter appendix p. 17a). A Magistrate in the Court in which this case began, and in which a Magistrate served as judge and prosecutor, has made the decision on the part of the State that there shall be a new trial.

Even if a fair trial could now be had, a conviction in the Magistrate's Court will be nullified by an "appeal" for a "trial de novo" in the County Court, and a whole new series of trials and appeals will be set in motion.

The *Palko* case said of the Fifth Amendment (P. 323):

> "It forbade jeopardy in the same case if the new trial was at the instance of the government and not upon the defendant's motion."

The new trial in this case was at the instance of the government, because the petitioner moved only for the mandatory final acquittal which was wrongfully denied.

The use of discretion by the Appellate Court to help the prosecutor with another chance to convict by remanding for new trial, after a reversal for insufficiency of evidence where there was no motion for a new trial, is equally as offensive as the granting of a mistrial by the trial court merely to help the prosecutor, *Sapir* vs. *United States,* supra.

The intention of the courts of New Jersey not only to take advantage of the reversible error of the County Court in denying a mandatory acquittal as the only basis for making the application of the defense of

double jeopardy discretionary, but also to pass the discretion on to the prosecutor, is apparent from *State* vs. *Lamoreaux* (P. 76):

> "Moreover it may be divulged in conclusion that where we have been concerned with reversals for the failure of proof of some essential element of th crime charged, we have reversed and remanded the case and deliberately refrained from making a new trial positively mandatory. The availability of the proof required is within the knowledge of the prosecuting official, whose function it is, in such cases, to resolve whether the indictment should be dismissed or the defendant placed again on trial,"

The Supreme Court of New Jersey, by citing with approval *State* vs. *Lamoreaux,* supra, in *State* vs. *Croland,* 31 N.J. 380, 384 (1960) and by denying the petition for certification to review this case, shows a manifest intention to maintain the rule of discretion and the passing onto others of the discretion in deciding the double jeopardy issue in such cases.

It refuses to apply the doctrine of *Sapir* vs. *United States,* supra, on which the petitioner relies for a mandatory acquittal, under the circumstances of this case.

It was for just such reason that the opinion in *Downum* vs. *United States* (supra) concluded:

> "We resolve any doubt in favor of the liberty of the citizen rather than exercise what would be an unlimited, uncertain and arbitrary judicial discretion."

CONCLUSION

For the foregoing reasons, this writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of the Appellate Division of the Superior Court of New Jersey

(Dated November 10, 1964)

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Docket No. A–373–63.

STATE OF NEW JERSEY,
Plaintiff-Respondent,

vs.

JOHN E. RING,
Defendant-Appellant.

GAULKIN, S.J.A.D.

Defendant was convicted in the municipal court of Lyndhurst on a complaint which charged him with "speeding 45 m.p.h. in a 25 m.p.h. zone." The County Court affirmed on the stenographic record made in the municipal court. Defendant appeals.

Defendant contends that the conviction must be reversed because the State presented no evidence of the speed limit at the place of the offense. He contends that under N.J.S.A. 39:4-98 the *prima facie* lawful speed at all points is 50 m.p.h.; if the State claims that at a given point the lawful speed is less, the State must prove it; and since there was no such proof he is entitled to an acquittal.

Opinion of the Appellate Division of the Superior Court of New Jersey, November 30, 1964

The County Court acknowledged that there was no such proof, but held that since the question had not been raised by the defendant in the municipal court it was "too late for him now to argue that there was something more to try below." The County Court reasoned thus:

> "The transcript shows that the defendant made no point of the defect in the State's proof at the close of its case. He took the stand to refute the officer's observations and conclusion as to the speed the defendant was traveling in fact. Actual speed was the single matter litigated. When the defense was narrowed down to this issue, its context, as set up by the complaint, was no longer vital. A valid 25 mile per hour limit was necessarily implied in the posture of the defendant's case."

We disagree. As in any criminal case, the burden was upon the State to prove all the essential elements of the offense charged. Here proof the speed limit was essential. *State* v. *Miller,* 58 N.J. Super. 538 (Cty. Ct. 1959). Defendant's failure to raise the need to prove this essential fact can not be turned into an admission of that fact or a waiver of proof of it. The conviction must therefore be reversed.

This brings up the question whether defendant should now be acquitted or whether the case should be remanded to the municipal court for a new trial.

Defendant admits that we are not compelled to acquit and that we may order a new trial. *Board of*

Commissioners v. *Inlander,* 7 N.J. Super. 192, 194 (App. Div. 1950); cf. *M.* v. *F.,* 60 N.J. Super. 156, 163 (App. Div. 1960). In those cases in which the County Court tries the case anew, and not on a stenographic record, a remand by us for a new trial of the facts is usually to the County Court, *State* v. *Miller,* 64 N.J. Super. 262 (App. Div. 1960); otherwise, to the municipal court. *State* v. *Morton,* 74 N.J. Super. 528 (App. Div. 1962). Cf. *State* v. *Mull,* 30 N.J. 231 (1959); *I.* v. *D.,* 60 N.J. Super. 211, 221 (App. Div. 1960); *State* v. *Gagliardi,* 57 N.J. Super. 238, 243 (App. Div. 1959); *M* v. *F.,* supra; *Board of Commissioners* v. *Inlander,* supra.

Defendant argues that here there should not be a new trial because the evidence on the merits was not sufficient to support a judgment of conviction, even if the 25-mile speed limit be assumed. Our examination of the testimony satisfies us that, had the speed limit been proved, the evidence would have been sufficient to support a conviction.

Defendant argues that "While it appears, under our cases in New Jersey, that a reversal of a conviction for lack of sufficient evidence of guilt does not ordinarily warrant an appellate judgment of acquittal and the preferred practice is the granting of a new trial, see *State* v. *Sullivan,* 77 N. J. Super 81, 86 (App. Div. 1962), applying the reasoning and theory expounded in the most recent Supreme Court decisions involving double jeopardy, this court, in its discretion, should enter a final judgment of acquittal or direct the same in the Court below if the case is reversed for in-

sufficiency of evidence as to an essential element of the crime charged, as was done by our Supreme Court in *State* v. *Croland,* 31 N. J. 380, 384 (1960) * * *" because it is fundamentally unfair to put him to the harassment, anxiety and expense of a new trial. However, it is a fact, as the County Court pointed out, that defendant, though represented by counsel, did not raise the point in the municipal court. It may be that the approach taken by the defendant led the State to believe that there was no dispute about the speed limit. In any event, had defendant raised the point in the municipal court (as was the case in *State* v. *Miller, supra,* 58 N. J. Super. 528) the question of the speed limit would have been settled there. Since he did not, but reserved it for appeal, the interests of the State outweigh the inconvenience to the defendant, and the State should be given the right to a new trial if it desires one. *Board of Commissioners* v. *Inlander, supra; State* v. *Lamoreaux,* 20 N. J. Super. 65, 76 (App. Div. 1952).

The conviction is reversed and the case is remanded to the municipal court of Lyndhurst for further proceedings not inconsistent with this opinion.

Mandate on Reversal by the Superior Court of New Jersey, November 10, 1964.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Appeal Docket No. A–373–63

CRIMINAL ACTION ON APPEAL

STATE OF NEW JERSEY,
Plaintiff-Respondent,

vs.

JOHN E. RING,
Defendant-Appellant.

This cause having been duly argued before this Court by William V. Roveto, counsel for the appellant and Ronald J. Picinich, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Bergen County Court is in all things reversed, set aside and for nothing holden, without costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless a Notice of Appeal to the Supreme Court or a Notice of Petition for Certification has been filed or is pending, or unless otherwise ordered by this Court, and that the record and proceedings be remitted to the said Bergen County Court to be there proceeded

Mandate on Reversal by the Superior Court of New Jersey, November 10, 1964

with in accordance with the rules and practice relating to that Court, consistent with the opinion of this Court.

WITNESS the Senior Judge of the Part, Superior Court of New Jersey, Appellate Division, at Trenton on the 10th day of November, 1964.

MORTIMER G. NEWMAN, JR.
Clerk of the Superior Court

I hereby certify that the foregoing is a true copy of the original on file in my office.

MORTIMER G. NEWMAN, JR.
Clerk

Point I and Point II of the Petition for Certification to the Supreme Court of New Jersey in this Case

POINT ONE

REMAND FOR A NEW TRIAL UNDER THE CIRCUMSTANCES OF THIS CASE VIOLATES THE DOUBLE JEOPARDY CLAUSE OF THE NEW JERSEY CONSTITUTION.

The only questions before the Appellate Division were whether a motion for acquittal for insufficiency of evidence was properly made in the County Court and whether it should have been granted.

The reversal answered both questions in the affirmative. The acquittal was mandatory under Rule 3:7-6.

No fault can be found with the procedure or conduct of the petitioner in the County Court or Appellate Division.

The petitioner made no motion for a new trial in the County Court or the Appellate Division but sought to correct the error made by the County Court in denying acquittal.

Our change in the rule making a new trial discretionary with the Court in some cases is in derogation of the common law and should be strictly construed.

In finding double jeopardy in *Downum* vs. *United States*, 272 U.S. 734 (1963) the Court concluded:

> "We resolve any doubt in favor of the liberty of the citizen rather than exercise what would be an unlimited, uncertain and arbitrary judicial discretion."

In *State* vs. *Lamoreaux*, 20 N. J. Super. 65 (1952) the Appellate Division reviewed the authorities sus-

taining its claimed right to remand for a new trial on reversal for insufficient evidence. The Supreme Court has not reviewed the cases but has cited it in *State* vs. *Menke,* 25 N. J. 66 (1957) and *State* vs. *Croland,* 31 N. J. 380, 1960. In each case it was dictum not necessary to the final decision.

State vs. *Lamoreaux* (supra) pointed out: P. 73

(1) The appeal is merely to continue the trial in the Appellate Court and reversal expunged the trial and record of the former trial as though there had been no trial.

(2) The defendant by seeking a reversal waives the right to avail himself of the former judgment.

Numerous other cases in the United States and New Jersey Supreme Court show that none of the reasons can apply to the circumstances of this case.

In *State* vs. *Williams,* 30 N.J. 105 (1959) the Supreme Court established the rule that there is an "irresistible implied acquittal" of first degree murder on a conviction for second degree murder on a first degree indictment, following *Green* vs. *United States* 355 U.S. 184 (1957).

Justice Francis held in effect that to declare that the reversal forfeited the implied acquittal is:

> "to thwart the fundamental principles of double jeopardy."

In the *Green* case Justice Black discarded the waiver theory and held it was completely demolished by Justice Holmes who had said in an earlier case:

Point I and Point II of the Petition for Certification to the Supreme Court of New Jersey in this Case

> "Usually no such waiver is expressed or thought of. Moreover it can hardly be imagined that the law would not correct a fatal error unless he should waive all rights so important as to be saved by an express clause in the United States Constitution."

Thus the reasons of *State* vs. *Lamoreaux* (supra) vanish. We have double jeopardy with an implied acquittal based on a former trial, even though the conviction was reversed.

In *Downum* vs. *United States* (supra) the prosecution started a trial and then discovered his main witnesses were absent. A mistrial was granted over defendant's objection. A conviction on a new trial two days later was reversed in the Supreme Court on the ground of double jeopardy. The reasons apply with equal force here. The Court said:

> "The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy." P. 737

> "Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable oportunity to convict are examples when jeopardy attaches." P. 736

Even the dissenting opinion does not help the State in this case for it only holds that public justice:

> "require that the Government have a fair oppor-

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> tunity to present the people's case and obtain an adjudication on the merits rather than the criminal be turned free because of the harmless oversight of the prosecutor."

In the present case there was no harmless oversight on the part of the prosecutor. He had, by the defendant's brief before the hearing in the County Court, notice of and deliberately ignored the defect in proof and the fact that petitioner would rely on *State* vs. *Miller,* 58 N.J. Super 538 (Cty. Ct. 1959).

In *Green* vs. *United States* (supra) Justice Black said the underlying idea is that the State with all its resources should not be allowed to make repeated attempts to convict: P. 187

> "Thereby subjecting him to embarrassment, expense and ordeal or compelling him to live in a continuing state of anxiety and insecurity."

We are distinguishing between errors and mistakes in the trial court which make the trial abortive, which are grounds for reversal as set out in Rule 1:5-1 and which can be corrected only by the defendant seeking a new trial; and reversal for failure to acquit for insufficiency of evidence which is a vested mandatory right under Rule 3:7-6.

The United States Supreme Court was slow but eventually did distinguish between a new trial at defendant's request to correct errors and a review without moving for a new trial to preserve the first trial and make it a double jeopardy bar by seeking the acquittal improperly denied.

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In *Bryan* vs. *United States* 338 U.S. 552 (1950) the Court sustained remand for a new trial after reversal for insufficiency of evidence where the defendant had also asked for a new trial. The Court gave no consideration to constitutional double jeopardy but devoted its attention to defining the Appeal Court's statutory right to reverse, remand and order what is "just" under the circumstances under the judicial code 28 U.S.C.A. 2106.

The United States Supreme Court made the distinction as contended by the petitioner in the following cases.

Sapir vs. *United States* 348 U.S. 373 (1955)
Forman vs. *United States* 361 U.S. 416 (1959)

In both cases the Circuit Court of Appeals reversed for insufficiency of evidence and ordered an acquittal. On rehearing the Court modified its remand and ordered a new trial in both cases.

In the *Sapir* case the Supreme Court reversed and ordered a final acquittal. Justice Douglas said the Court of Appeals held that the motion for acquittal should have been granted as the evidence was insufficient to convict; and that P. 374

> "if petitioner had asked for a new trial different consideration would have come into play, for then the defendant opens the whole record for disposition as might be just."

citing *Bryan* vs. *United States* (supra).

He said, P. 374,

"Moreover, a reversal by the Appellate Court on

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> grounds of error that infected the trial would also be different as Palko vs. Connecticut, 202 U.S. 319 shows."

There is no question of the general statutory right for the Court of Appeals to modify its mandate on rehearing; but this case put a constitutional limitation on the statutory right to remand with an order to do what is "just", under 28 U.S.C.A. 2106.

The law of this case is that when the Appellate Court finds that an acquittal was improperly denied in the lower court (the Federal rule is the same as Rule 3:7-6) there is an acquittal in law and the Court has no discretion to grant a new trial "absent a motion by the defendant for a new trial."

The petitioner's case is exactly the same except that the Appellate Court had not ordered an acquittal.

There is more room for finding an implied acquittal here than in *State* vs. *Williams* (supra) or *Downum* vs. *United States* (supra).

In *State* vs. *Currie,* 41 N.J. 531 (1964) Justice Jacobs said:

> "In applying the prohibition against double jeopardy emphasis should be on underlying policies rather than technisms. The primary considerations should be the fairness and fulfillment of reasonable expectations in the light of the constitutional and common law goals."

In *United States* vs. *Forman* (supra) the Court had also entered an acquittal and then on rehearing ordered a new trial.

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This was affirmed because in addition the jury had been improperly instructed and the defendant had moved for a new trial. The Court said, Page 426,

> "moreover, Sapir made no motion for a new trial in the District Court while here petitioner filed such a motion. That was a decisive fact in Sapir's case."

POINT TWO

REMAND FOR A NEW TRIAL UNDER THE CIRCUMSTANCES VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Double jeopardy is here a matter of State law. The Fourteenth Amendment does not make the Fifth Amendment binding on the State, *Palko* vs. *Connecticut,* 302 U.S. 319 (1937).

In *Palko* the right of the State to appeal in a criminal case for error in instructing the jury was upheld because there was no constitutional double jeopardy provision in Connecticut and it does not violate due process which calls for an orderly proceeding and right to be heard.

However, Justice Cardozo's opinion, left open the answer, P. 328,

> "if the State were permitted after a trial 'free of error' to try the accused over again or bring another action against him."

In *Brock* vs. *North Carolina,* 344 U.S. 424 (1953) the Court held a second trial in the State Court after a dismissal of the jury because two convicted wit-

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nesses refused to testify in the first trial until after they were sentenced, was not barred by the Fourteenth Amendment.

There were vigorous dissents and in a concurring majority opinion Justice Frankfurter said, P. 428:

> "Implications have been found in that program very different from the mood of fair dealings and justice which the Fourteenth Amendment exacts from a state in the prosecution of offenders."
>
> "A state falls short of its obligations when it callously subjects an individual to successive retrials on a charge from which he had been acquitted or prevents a trial from proceeding merely to allow a prosecutor who has been incompetent or casual or even ineffectual to see if he can do better the second time."

The language of Justices Cardozo and Frankfurter clearly applies to the present case and warrants a holding that to order a new trial under the circumstances is a denial of the Fourteenth Amendment Due Process Clause.

The Appellate Division in denying an acquittal after reversing on the ground it was improperly denied below, is equally as wrong as the trial court was in denying the acquittal in the first place. The substitution of one wrong for another wrong does not make a right. It makes an appeal as a matter of right a mockery on justice, and is a denial of due process.

The State cannot use this reversible error of the trial judge as the only basis to deny a constitutional defense of double jeopardy.

Order of the Supreme Court of New Jersey Denying the Petition for Certification, February 4, 1965

SUPREME COURT OF NEW JERSEY

C-72 SEPTEMBER TERM 1964

On Petition for Certification

ORDER DENYING PETITION

STATE OF NEW JERSEY,
Plaintiff-Respondent,

vs.

JOHN E. RING,
Defendant-Petitioner.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 4th day of February, 1965.

JOHN H. GILDEA, Clerk
Clerk of the Supreme Court

FILED
Feb. 5, 1965
JOHN H. GILDEA
Clerk

Letter from Bergen County Prosecutor's Office to the Magistrate at Lyndhurst, New Jersey

OFFICE OF THE COUNTY PROSECUTOR
COUNTY OF BERGEN

Hackensack, New Jersey
(201) 487-3400

[EMBLEM]

GUY WM. CALISSI
County Prosecutor

Assistant County Prosecutors
FRED C. GALDA
THOMAS J. RYAN
ROBERT DILTS
CHARLES J. SAKANY
FRANCIS X. BURKE
JOHN K. WALSH
FRANK WAGNER
RONALD J. PICINICH
RALPH A. POLITO

February 25, 1965

Honorable William Bivona
Magistrate
Municipal Court
Lyndhurst, New Jersey

Re: State v. John E. Ring

Dear Judge:

I am enclosing a copy of the Order Denying Petition for Certification in the above-entitled matter.

You may now proceed to re-try the defendant if you so desire.

Very truly yours,

RONALD J. PICINICH
Assistant Prosecutor

RJP:rb
Encl.
CC: Moser, Roveto & McGough, Esqs.

Letter from Clerk of the Municipal Court of Lyndhurst, New Jersey, March 15, 1965, Adjourning a New Trial Pending This Petition for a Writ of Certiorari

MUNICIPAL COURT
TOWNSHIP OF LYNDHURST, NEW JERSEY

WILLIAM L. BIVONA
Magistrate

ARTHUR L. HERRMANN, Clerk
Tel. 438-4661

March 15, 1965

William V. Roveto, Esq.
Moser, Roveto & McGough
415 – 32nd Street
Union City, N. J.

Re: State vs. John E. Ring

Dear Mr. Roveto:

This is in response to your recent communication requesting adjournment of the above-captioned matter for reason of filing of Petition for Writ of Certiorari in the United States Supreme Court.

Be advised that this matter shall be adjourned without date, and I ask that you notify me at such time as you receive notice of the disposition of your Petition.

Upon receipt of such notification, I shall then set a date for re-trial if necessary.

Yours very truly,

ARTHUR L. HERRMANN
Arthur L. Herrmann, Clerk

ALH:hw

Rule 3:7-6 of Rules of Criminal Practice

MOTION FOR JUDGMENT OF ACQUITTAL

(b) Motions for directed verdict of acquittal are abolished and motions for judgment of acquittal shall be used in their place. The court, on motion of a defendant or of its own motion, shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or accusation at the close of the state's case or after the evidence of both sides is closed, if the evidence is insufficient to warrant a conviction. If a defendant's motion for judgment of acquittal at the close of the state's case is not granted, the defendant may offer evidence without having reserved the right.